BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEISHA LYNETTE MOCK	)	
Claimant	)	
	)	
VS.	)	Docket No. **1,034,349**
	)	
SHAWNEE COUNTY	)	
Self-Insured Respondent	)	

ORDER

Claimant requests review of the January 25, 2008 preliminary hearing Order Denying Temporary Total Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

Keisha Mock alleged she suffered a right inguinal hernia as a result of accidental injury while working for respondent. The Administrative Law Judge (ALJ) found Mock had failed to prove that her hernia was caused by her employment with respondent. The ALJ, therefore, denied her request for temporary total disability compensation and payment of past medical expenses. The ALJ concluded in pertinent part:

> Claimant failed to prove her hernia arose out of and occurred in the course of her employment with the respondent. Ms. Mock was unable to identify an event or a series of events at work which was the likely cause of the hernia. It is just as likely the condition was congenital.

Mock appealed and argues she met her burden of proof to establish that her work activities, including lifting laundry bags and pushing carts, caused her hernia and that even if the hernia was congenital her work activities aggravated and worsened that condition. Mock requests the Board to reverse the ALJ, find she suffered a compensable injury and award her temporary total disability compensation as well as payment for the medical treatment she received for her hernia condition.[1]

Respondent argues Mock was unable to identify a particular incident at work that caused the onset of her abdominal pain but she had told her physician that she suffered

[1] See K.S.A. 44-510d(a)(22).

the onset of abdominal pain before the date of her alleged injury at work. Consequently, respondent further argues Mock failed to meet her burden of proof that her hernia was caused or aggravated by her work for respondent. Respondent also argues Mock did not provide timely notice of her alleged injury. Respondent requests the Board to affirm the ALJ's Order Denying Temporary Total Compensation.

The issues before the Board on this appeal are whether Mock sustained personal injury by accident arising out of and in the course of employment and, if so, did she provide timely notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Keisha Mock, a correction specialist, worked first shift from 6 a.m. to 2:30 p.m. for respondent. Her job duties included doing the inmates' laundry. The laundry was placed into five or six bags and claimant would lift these bags onto carts. She would push more than one cart at a time and the carts were hard to push. She testified a bag of laundry would weigh approximately 35 pounds.

Mock could not recall the specific date she experienced the onset of abdominal pain at work. But she did recall that when she arrived at work that particular day she felt fine and she further recalled she was doing laundry. During the course of the day she felt sharp pain in her lower abdomen. She felt the onset of pain occurred while she was doing the laundry and pushing the carts but could not recall a specific incident.[2] She testified she tried to schedule an appointment with her family physician but couldn't get in to see him until a regularly scheduled examination later in the month.

On January 18, 2007, Mock saw her family physician, Dr. Michael Engelken, for her "well woman exam" and a pap smear. During the course of the examination Mock complained of recurrent right lower quadrant pain for over a month. Mock further noted she felt that something pushes out in that area. Dr. Engelken suspected Mock had a right inguinal hernia but after he examined Mock he was still not certain so he referred her to Dr. James Hamilton Jr. for a second opinion. On February 2, 2007, Mock was examined and evaluated by Dr. Hamilton. Mock told the doctor that she had right groin pain and discomfort with lifting and straining. The doctor diagnosed a right inguinal hernia and ultimately surgery was scheduled.

[2] Mock Depo. at 7.

Mock explained that she did not know what was causing her pain so she saw her personal physician. She was then still uncertain until Dr. Hamilton diagnosed a right inguinal hernia. Mock testified that after Dr. Hamilton confirmed that she had a right inguinal hernia she then reported the accidental injury to her supervisor on February 5, 2007. Mock was told to pick a specific date of injury to put on the report. Again, Mock thought the onset of abdominal pain had occurred "on or around sometime in January 2007"[3] and she selected the date of January 3, 2007. The Officer's Report Sheet, dated February 7, 2007, was signed by Mock and provided:

> I came to work on January the 3rd and I was feeling fine and sometime throughout my day I felt this pain in my stomach. I continued on with my day. Later that day I contacted my doctor to make an appointment. My doctor told me that I have a Hernia.[4]

Mock stated that she worked until her surgery and as she continued working her pain worsened. On March 22, 2007, Dr. Hamilton performed a surgical repair of Mock's right inguinal hernia. She returned to work on April 30, 2007.

Dr. Hamilton explained that a hernia is a protrusion of the viscus outside of its normal anatomical confines. The doctor noted that the defect in the abdominal wall can develop gradually with repeated stress such as lifting activities. And the pain Mock experienced was indicative of either developing the hernia or a worsening of the hernia.[5] Dr. Hamilton further agreed that a hernia would be work related if a person was feeling fine and went to work but by the end of the day had pain and was found to have a hernia. Conversely, if the pain was present before the pain on that one day and was not reported as incidental to work then the diagnosed hernia would not be work-related. Dr. Hamilton testified:

> Q. If the person's testimony is "I was feeling fine, not having any problems, and went to work that day and by the end of the day I had pain," would that indicate to you as a physician that the hernia had occurred that day?
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> A. If that person reported it to their employer and then saw me afterwards and was found to have a hernia, I would say that was a work-related hernia.

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[3] *Id*. at 4.

[4] *Id.*, Ex. 1.

[5] Hamilton Depo. at 12.

> Q. If ordinarily the pain had been present for some time prior to them saying that the pain had just begun on that one day, would that be an indication that the hernia had been present prior to the day that they were relating that it started?
>
> A. That's a little more difficult in the sense that if the pain was present at work for some time and they reported to their employer that it was. You know, you could have someone who goes to work and gets a little discomfort in their groin and thinks it will go away and they go to work three or four days and it keeps coming and they report it to their employer. If it's something that happens at work, and you can have that stuff happen over time, it's got to be related to the work incident. That's really the definition. You can have pain while working in your garden and then have that happen at work and if you felt it was in your garden and you told me that I would say it's not related to work.
>
> Q. So if the pain began before the work incident - -
>
> A. And it was not reported in any way with the work incident I would say that is not work-related.[6]

Dr. Engelken agreed that if someone was engaged in lifting activities and they start to develop a hernia it can get progressively worse with continued lifting activities.

Mock alleged not only a specific injury at work but also a series of repetitive injuries each and every day worked until her surgery on March 22, 2007. She told her supervisor on February 5, 2007, that she was injured at work and had been diagnosed with a hernia. She then continued working until her surgery on March 22, 2007. She stated that from the initial onset of her abdominal pain she worked in pain and her pain worsened as she continued working. As previously noted, Dr. Hamilton stated that pain is an indication that a hernia is worsening. Moreover, both doctors agreed that lifting can cause hernias and lifting activities after an onset of symptoms can cause a hernia to progressively worsen.

Respondent points to the fact Mock stated she had experienced recurrent abdominal pain for over a month when she initially saw Dr. Engelken on January 18, 2007, as establishing that her hernia predated any work-related event in January 2007. Mock testified that although she was uncertain of the specific date when she initially experienced the onset of abdominal symptoms, nonetheless, she testified the onset of symptoms occurred at work. Her comment to her doctor that she had recurrent pain for a month is not fatal to her claim as she was admittedly uncertain of the specific date she experienced the initial onset of abdominal pain at work. And as she did not know what was causing her abdominal pain when she first visited Drs. Engelken and Hamilton it is not surprising that she did not provide a history that her then unknown condition was caused by work.

[6] Hamilton Depo. at 16-17.

However, when she was diagnosed with a right inguinal hernia she then notified respondent that she had suffered a work-related injury. Although this notice was not within the statutorily mandated 10 days the claimant had just cause for failing to notify respondent as she was unaware of the relationship between her condition and work until she received the definitive diagnosis from Dr. Hamilton. Consequently, this Board Member finds claimant has met her burden of proof that she suffered a work-related injury and established just cause for providing notice within 75 days of her work-related accident.

Moreover, it is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[7] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[8] And the claimant's testimony alone is sufficient evidence of her physical condition.[9]

Although neither doctor specifically stated that Mock's continued work activities after she was diagnosed with a hernia caused her condition to worsen, they agreed that a hernia can progressively worsen and pain is indicative of that worsening. Mock testified that her initial onset of abdominal pain occurred at work and that after she notified respondent that she had been diagnosed with a hernia she continued working in ever worsening pain. Her testimony is sufficient to establish that, at a minimum, her continued work aggravated and worsened her hernia. Consequently, Mock also met her burden of proof to establish that as she continued to work she suffered repetitive injuries and aggravations to her hernia and her notice to her employer on February 5, 2007, was timely for this repetitive series of injuries.[10]

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[7] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[8] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

[9] *Hanson v. Logan U.S.D. 326*, supra.

[10] See K.S.A. 44-508(d)

[11] K.S.A. 44-534a.

as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated January 25, 2008, is reversed and remanded to the Administrative Law Judge for further proceedings and/or orders, if necessary, consistent with the above findings and conclusions.

IT IS SO ORDERED.

Dated this _____ day of April 2008.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Larry G. Karns, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[12] K.S.A. 2007 Supp. 44-555c(k).